Office - Supreme Court, U.S.
FILED
MAY 29 1984
ALEXANDER L. STEVAS
CLERK

Nos. 83-1555 and 83-1638

In the Supreme Court of the United States

OCTOBER TERM, 1983

HOOPA VALLEY TRIBE OF INDIANS, PETITIONER

v.

JESSIE SHORT, ET AL.

CHRISTOPHER EDDY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

JAMES E. BROOKSHIRE
DAVID C. SHILTON
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. The question presented in No. 83-1555 is:

Whether the plaintiffs in district court, who are suing as individuals and not as members of an Indian Tribe, nevertheless may be regarded under 25 U.S.C. 407 as "members of the tribe or tribes concerned" with the harvesting of timber on a portion of the Hoopa Valley Reservation and therefore entitled under 25 U.S.C. 407 to share in per capita distributions of the revenues derived from that timber harvesting.

2. The questions presented in No. 83-1638 are:

a. Whether the Claims Court erred in denying petitioners' motions for summary judgment on the ground that they had not yet established a sufficient nexus to the Hoopa Valley Reservation to be regarded as "members of the tribe or tribes concerned" and therefore entitled to share in per capita distributions of Reservation timber revenues under 25 U.S.C. 407.

b. Whether the interlocutory decision of the Claims Court granting motions for summary judgment filed by other plaintiffs and denying motions for summary judgment filed by petitioners should be vacated because the same attorneys represented petitioners and the other plaintiffs, even though petitioners' claim of a conflict of interest has not been considered by the courts below and may be raised in the course of further proceedings in the courts below and, if necessary, in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Stattues, regulation and rules:

Miscellaneous: Page

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1555

HOOPA VALLEY TRIBE OF INDIANS, PETITIONER

v.

JESSIE SHORT, ET AL.

No. 83-1638

CHRISTOPHER EDDY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23)[1] is reported at 719 F.2d 1133. The recommended decision

[1] Unless otherwise indicated, all references to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari filed by the Hoopa Valley Tribe in No. 83-1555.

of the trial judge of the former Court of Claims (83-1638 Pet. App. B1-B101) is unreported. The 1981 en banc opinion of the Court of Claims (Pet. App. 24-39) is reported at 661 F.2d 150, and the 1973 opinion of the Court of Claims (Pet. App. 40-151) is reported at 486 F.2d 561.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1983. On December 29, 1983, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 83-1555 to and including March 4, 1984, and the petition was filed on March 3, 1984. On December 30, 1983, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 83-1638 to and including March 4, 1984, and that petition was filed as of March 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). There is, however, a substantial question whether this case was properly "in" the court of appeals and therefore whether it is within this Court's certiorari jurisdiction under 28 U.S.C. 1254(1). See pages 7-8 & note 6, *infra*; 83-1555 Pet. 5 n.3. See, *e.g.*, *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-743 (1982).

STATUTES INVOLVED

The principal statute involved is 25 U.S.C. 407, which was originally enacted by Section 7 of the Act of June 25, 1910, Ch. 431, 36 Stat. 857, and was amended by Section 1 of the Act of April 30, 1964, Pub. L. No. 83-301, 78 Stat. 186. As set forth below, additions made by the 1964 amendment are underscored and deletions made by that amendment are enclosed in brackets:

> SEC. 7. The [mature and living and dead and down] timber on unallotted lands of any Indian reservation may be sold in *accordance with the principles of sustained yield, or in order to convert the land to a more desirable use,* under regulations to be prescribed by the Secretary of the Interior, and the

proceeds from such sales, *after deductions for administrative expenses, pursuant to the Act of February 14, 1920, as amended (25 U.S.C. 413)* shall be used for the benefit of the Indians [of the reservation] *who are members of the tribe or tribes concerned* in such manner as he may direct [: Provided, that this section shall not apply to the States of Minnesota and Wisconsin].

STATEMENT

1. a. This action was filed in 1963 in the former Court of Claims seeking money damages from the United States for the government's allegedly wrongful exclusion of the individual plaintiffs from participation in past per capita distributions of revenues from the sale of timber on unallotted lands on the original portion of the Hoopa Valley Indian Reservation in California, commonly known as the "Square." This 12-mile square portion of the Reservation was originally located in 1864 by the Superintendent of Indian Affairs for California, pursuant to authority conferred by the Act of April 8, 1864, ch. 48, 13 Stat. 39 (Pet. App. 57), and it was formally set aside by Executive Order of the President on June 23, 1876 (I Kappler, *Indian Affairs* 815 (2d ed. 1904); Pet. App. 67-68). See *Mattz* v. *Arnett*, 412 U.S. 481, 490 n.9 (1973). By Executive Order dated October 16, 1891 (I Kappler 815; Pet. App. 69), the original Hoopa Valley Reservation was extended to enclose a one-mile wide strip, known as the "Addition" or "Extension," located along the Klamath River between the Square and the Pacific Ocean. See map appended to the Court's opinion in *Mattz* v. *Arnett*, 412 U.S. at 506; see also *id.* at 494 & n.16; *Donnelly* v. *United States*, 228 U.S. 243 (1913).

The Square traditionally has been occupied by the Hoopa Indians, who are formally organized as a Tribe (and recognized by the federal government as such) under a constitution adopted in 1950, and who have a formal tribal roll that also was adopted in 1950 (Pet. App. 124-

131). Since 1935, the Secretary of the Interior has made per capita distributions of revenues from the sale of timber on unallotted lands on the Square only to persons listed on the official tribal roll of the Hoopa Valley Tribe. The approximately 3,800 individual plaintiffs in this suit (Pet. App. 2) are not members of the Hoopa Tribe, but are persons of Indian ancestry who claim some connection with that portion of the Reservation along the lower reaches of the Klamath River known as the Addition, although approximately 80% of the plaintiffs do not reside there (83-1555 Pet. 12 n.8). They contend in this action that the Secretary could not lawfully confine per capita distributions of timber revenues from unallotted lands on the Square to members of the Hoopa Valley Tribe, which resides on the Square, and that the Secretary is required instead to include Indians of all portions of the Reservation in such distributions. They seek in this suit to recover money damages from the United States for their allegedly unlawful exclusion from past per capita distributions.

In an opinion issued in 1973 (Pet. App. 40-151), the Court of Claims agreed with the plaintiffs, holding that the Square and Addition must be treated as one integrated Reservation intended "for an undetermined number of tribes" (Pet. App. 47) and that the Secretary therefore erred in confining the per capita distributions of timber revenues on the Square to members of the Hoopa Valley Tribe. The Court of Claims did not decide in its 1973 opinion which persons in addition to the members of the Hoopa Valley Tribe were entitled to share in such distributions, leaving that matter to be resolved in further proceedings before the trial judge (Pet. App. 41, 151). The United States and the Hoopa Valley Tribe petitioned for a writ of certiorari from the holding that the Secretary could not distribute timber revenues from the Square only to the members of the Tribe that resided there (and from the resulting determination that the United States was liable for money damages to at least some of the plaintiffs), but this Court denied the petitions, with two Justices dissenting. 416 U.S. 961 (1974).

b. In a further opinion in the case in 1981, the Court of Claims observed that in 1973 it had "held * * * that all Indians of [the] Reservation were entitled to share in all of its revenues that were distributed to individual Indians (including the timber revenues from the Square), and that the plaintiffs who were Indians of the Reservation [even though not members of the Hoopa Valley Tribe] were entitled to recover the monies the government had withheld from them" (Pet. App. 26-27). The 1981 opinion reaffirmed that 1973 holding, concluding that "individual Indians [of the Reservation were] entitled to recover" (*id.* at 30) because they had been "arbitrarily excluded [by the Interior Department] from *per capita* distributions" (*id.* at 31) to which they were entitled "on an individual (rather than a tribal) basis" (*id.* at 32).[2]

One question that remained to be resolved when the Court of Claims issued its 1981 opinion, however, was how to determine which of the numerous individual plaintiffs who claimed to be Indians of the Reservation in fact should be regarded as such for purposes of the right to participate in Reservation timber revenues and therefore to recover damages from the United States.[3] The Court of

---

[2] The plaintiffs did not purport to sue as members of a Tribe. The Coast Indian Community of Yurok Indians of the Resighini Rancheria is organized under the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.* See 48 Fed. Reg. 56862, 56863 (1983). The Yurok Tribe of the Hoopa Valley Reservation is a federally recognized tribe, *id.* at 56865, but is not formally organized (Pet. App. 28-29). In 1979, the government had moved to substitute the Yurok Tribe for the thousands of individual plaintiffs on the theory that only a tribal entity could, under 25 U.S.C. 407, have any possible claim to timber revenues. In its 1981 opinion, the Court of Claims denied that motion, noting that there was "no [such] existing organizational or functional tribal entity" (Pet. App. 29).

[3] At the time of the 1981 opinion, judgment already had been entered in favor of approximately 143 plaintiffs who were determined to be qualified under the Court of Claims' 1973 decision. These judgments were the results of adjudications by the Court of Claims or of the government's failure to contest the claims of the particular claimants. See Pet. App. 9 n.9, 27-28.

Claims accordingly remanded the case to the trial judge once again with instructions to issue a recommended decision "determining, under standards he will formulate in accordance with [the 1981] opinion, which of the plaintiffs whose cases are ready for disposition are Indians of the Reservation" (Pet. App. 39). The Court of Claims directed the trial judge to consider the standards governing membership in the Hoopa Valley Tribe as "an appropriate guideline and basis" to formulate standards for the eligibility of the plaintiffs, even though the plaintiffs are not members of that Tribe (Pet. App. 38).

The United States and the Hoopa Valley Tribe again filed petitions for a writ of certiorari to review the Court of Claims' holding that the plaintiffs who claimed some nexus only to the Addition had a right to share in per capita distributions of timber revenues from the Square, but this Court again denied certiorari. 455 U.S. 1034 (1982).

2. a. On March 31, 1982, the trial judge issued his recommended decision in response to the remand. The trial judge identified five categories of plaintiffs who were entitled to share in per capita distributions of timber revenues and thus to recover damages from the United States. These categories were patterned after parallel membership standards for the Hoopa Valley Tribe (Pet. App. 10-11).[4] Some 2,300 plaintiffs were found to fall within

---

[4] These categories are (Pet. App. 11-12 n.13):

A. Allottees of the Reservation and their descendants living anywhere on the Reservation on October 1, 1949;

B. Residents of the Reservation (and their descendants) living on October 1, 1949, who have received Reservation benefits and services, and hold an assignment or can prove entitlement to an allotment;

C. Persons living on June 2, 1953 with at least ¼ Reservation blood (defined to include a number of tribes connected with the Reservation) who had lived on the Reservation for 15 years prior to June 2, 1953 and have ancestors born on the Reservation;

these categories (Pet. App. 213, 235-236, 248A, 251), and summary judgments were entered for them and against the United States in "amounts to be ascertained in further proceedings" (83-1638 Pet. App. B96). The motions for summary judgment on behalf of the plaintiffs other than these 2,300 were denied "without prejudice to renewal within three months after this order becomes final," if the particular plaintiff demonstrates that he does qualify under one of the standards adopted by the court or that "denial of qualification of the plaintiff would on the special facts of the case be manifestly unjust" (*id.* at B100).

Pursuant to Rule 54(b)(3) of the former Court of Claims, all parties filed requests with that court to review the recommended decision. All such requests for review were pending in the Court of Claims on October 1, 1982, the date on which the Court of Claims was abolished and the new Claims Court and United States Court of Appeals for the Federal Circuit replaced it.[5] On October 4, 1982, the Federal Circuit issued an order directing the Claims Court to transmit to it a "judgment" corresponding to each trial judge's recommended decision still pending. Such a "judgment" accordingly was entered by the Claims Court in this case on October 6, 1982. This case was then transferred to the Federal Circuit. Despite a substantial

---

D. Persons possessing at least ¼ Indian blood and who were born after October 1, 1949 and before August 9, 1963 [the date the present action was commenced] to a parent who did qualify or would have qualified as an Indian of the Reservation under A, B or C, *supra*; and

E. Persons born on or after August 9, 1963, of at least ¼ Indian blood derived exclusively from a parent or parents who qualified under A, B or C, *supra*.

[5] See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 101, 105(a), 402, 96 Stat. 25, 26-28, 57.

question whether it had jurisdiction over the appeal,[6] that court nevertheless proceeded, after additional briefing, to

[6] This "transfer" process was required by Section 403(a) of the Federal Courts Improvement Act, Pub. L. No. 97,164, 96 Stat. 57-58. Section 403(a) states that if, on October 1, 1982, a request for review was pending in the former Court of Claims, then the relevant "case * * * shall be transferred to the United States Court of Appeals for the Federal Circuit." The Section 403(a) transfer process was automatic and was not triggered by any act of the litigants, such as the filing of a notice of appeal or a petition. Section 403(a) provides no guidance with respect to the appropriate disposition of a case "transferred" to the Federal Circuit. However, in *Aleut Tribe* v. *United States*, 702 F.2d 1015 (1983), the Federal Circuit held that Section 403(a) does not confer jurisdiction on the Federal Circuit if the Claims Court's decision was not otherwise appealable to that court pursuant to 28 U.S.C. 1295(a)(3) or 1292(d)(2). The first of these provisions confers jurisdiction on the Federal Circuit over appeals from "final decisions" of the Claims Court, and the second provides for interlocutory appeal of Claims Court orders by a process of certification parallel to that in 28 U.S.C. 1292(b). See also *Ellis* v. *United States*, 711 F.2d 1571, 1574-1575 (Fed. Cir. 1983). In this case, as in *Aleut Tribe*, the trial judge, in entering a "judgment" on October 6, 1982, did not make the necessary certification for interlocutory appeal pursuant to 28 U.S.C. 1292(d)(2).

The Federal Circuit also does not appear to have had jurisdiction under 28 U.S.C. 1292(a)(3). Insofar as the trial judge's recommended decision (as converted into a Claims Court judgment on October 6, 1982) *denied* the motion for summary judgment on behalf of individual plaintiffs, including the petitioners in No. 83-1638, it plainly was not an appealable "final decision." *Switzerland Ass'n* v. *Horne's Market*, 385 U.S. 23 (1966). Moreover, it does not appear that the trial judge's recommended decision (as converted into a Claims Court judgment) that granted summary judgment in favor of the other plaintiffs on the question of the liability of the United States was a "final decision" appealable to the Federal Circuit as of right by the United States or the Hoopa Valley Tribe, since the amount these plaintiffs are entitled to recover remains to be decided in further proceedings. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744 (1976); cf. *Catlin* v. *United States*, 324 U.S. 229, 233 (1945); but cf. *Airborne Data, Inc.* v. *United States*, 702 F.2d 1350, 1361 & n.23 (Fed. Cir. 1983). But even if a liability determination is appealable as of right, an appeal would not seem to have been available in this case because the Claims Court did not enter a final decision with respect to all parties; as noted above, the

consider the pending requests for review of the Claims Court's "judgment."

b. On March 7, 1983, during oral argument before the court of appeals, counsel for the Tribe announced that it would move to dismiss this case for lack of subject matter jurisdiction in the Claims Court. The basis for the Tribe's motion, formally filed on March 14, 1983, was that under *United States* v. *Mitchell* (*Mitchell I*), 445 U.S. 535 (1980), the plaintiffs did not have a cause of action under the Tucker Act to recover money damages against the United States based on the Secretary's decision not to include them in the per capita distribution of timber revenues he made to members of the Hoopa Valley Tribe. In April 1983, the United States also moved to dismiss for lack of subject matter jurisdiction on virtually identical grounds.

In opposing dismissal, the plaintiffs contended that their substantive right to participate in per capita distributions of timber revenues—and therefore their right to recover a money judgment from the United States—was based on 25 U.S.C. 407. That Section provides that the Secretary of the Interior shall manage timber on unallotted lands on an Indian Reservation in accordance with principles of sustained yield and that the proceeds from the sale of such timber "shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as [the Secretary] may direct." Previ-

---

denial of summary judgment to the petitioners in No. 83-1638 was not a final judgment. The Claims Court could direct entry of a final judgment as to fewer than all the parties "only upon an express determination that there [was] no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). See *Aleut Tribe* v. *United States*, 702 F.2d at 1020; *Ellis* v. *United States*, 711 F.2d at 1575 & n.4. No such express determination pursuant to Fed. R. Civ. P. 54(b) was made here.

Although the jurisdictional problem was called to the Federal Circuit's attention, that court did not discuss it.

ously, both the plaintiffs and the Court of Claims had appeared to base the plaintiffs' substantive right to monetary relief on the Act of April 8, 1864 and the Executive Orders issued thereunder, which provided for the establishment of the Reservation (see page 3, *supra*) and which, the Court of Claims had held, required the Reservation to be treated as an integrated unit intended for the equal benefit of all Indians of the Reservation.

On October 6, 1983, the court of appeals affirmed the Claims Court's judgment and remanded for further proceedings in accordance with its opinion. Relying upon this Court's intervening decision in *United States* v. *Mitchell* (*Mitchell II*), No. 81-1748 (June 27, 1983), in which the Court held that Indians may sue the United States for damages for breach of its fiduciary duties in managing timber resources, the court held that the Claims Court had subject matter jurisdiction in this case under the Tucker Act (Pet. App. 3-9). In the court of appeals' view, it must follow from *Mitchell II* that the United States "was under fiduciary obligations with respect to the comparable Indian forest lands involved here," and that the United States therefore is liable under 25 U.S.C. 407 "for breach of fiduciary obligation in failing to distribute the [timber] sale proceeds (and other income) to persons entitled to share in those proceeds—such as those plaintiffs who turn out to be qualified in this case" (Pet. App. 4).

The court of appeals also rejected the contention that the plaintiffs do not fall within the group of persons specified in 25 U.S.C. 407 as intended beneficiaries of the timber proceeds—*i.e.*, the "members of the tribe or tribes concerned"—because they were not members of the Hoopa Valley Tribe or some other organized or recognized Tribe but were instead suing as individuals (Pet. App. 6-8). "[I]t is clear to us," the court reasoned, "that Congress, when it used the term 'tribe' in this instance, meant only the general Indian groups communally concerned with the proceeds—not an officially organized or recognized Indian tribe—and that the qualified plaintiffs fall into the group

intended by Congress" (Pet. App. 7). The court observed in this regard that the term "tribe" has "no fixed, precise or definite meaning," and noted that the definition of the term in the Indian Reorganization Act includes "Indians residing on one reservation" (25 U.S.C. 479). "With respect to the Hoopa Valley Reservation," the court concluded, "that is its meaning in 25 U.S.C. § 407." Pet. App. 7-8.[7]

On the merits, the court of appeals rejected all parties' objections and affirmed the trial judge's decision establishing standards under which plaintiffs may qualify for entitlement to compensation for their exclusion from prior per capita distributions. Pet. App. 9-20. The court stressed that all it was deciding was the nature of the standards to be applied in determining which plaintiffs should share in monies from the Hoopa Valley Reservation that were unlawfully withheld from them. Thus, the court explained: "We are *not* deciding standards for

---

[7] The court of appeals also relied upon another statute, 31 U.S.C. 1321(a)(20), in finding that the plaintiffs had a substantive right to sue to recover part of the timber-sale revenues that had been deposited in a Treasury trust fund account and then, in the court's view, "improperly distributed to others or illegally withheld from those claimants" (Pet. App. 8-9). Section 1321(a)(20) provides that "Indian moneys, proceeds of labor, agencies, schools, and so forth" are "classified as trust funds" in the Treasury. The court concluded that the "proper beneficiaries" of such trust funds "can sue under the Tucker Act if those funds illegally leave the Treasury" (Pet. App. 8).

Section 1320 is a 1982 reenactment and codification of Section 20(a)(20) of the former Permanent Appropriation Repeal Act of 1934, ch. 756, 48 Stat. 1233, as amended, 31 U.S.C. (1976 ed.) 725s(a)(20). Interior Department regulations designate these funds as Indian Money, Proceeds of Labor (IMPL) accounts. 25 C.F.R. Pt. 113. In 1982, Congress directed the Secretary of the Interior to cease depositing funds in IMPL accounts and to establish procedures for the determination of ownership of IMPL funds and for their distribution to tribes or to individual Indians. Supplemental Appropriations Act, 1982, Pub. L. No. 97-257, Tit. I, 96 Stat. 818, 838-839. See 48 Fed. Reg. 48806 (1983).

membership in *any* tribe, band or Indian group, *nor* are we ruling that Hoopa membership standards should or must control membership in a Yurok tribe or any other entity that may be organized on the Reservation" (Pet. App. 20 (emphasis in original)). The court further explained that its decision would control "only for the years until final judgment, and for the years to come while the situation in the Reservation remains the same subject of course to births and deaths" (*ibid.*). With this limitation, the court remanded to the Claims Court for further proceedings consistent with its opinion (*id.* at 21).

3. On December 9, 1983, and January 26, 1984, respectively, the attorneys who originally represented petitioners in No. 83-1638 and the other plaintiffs (83-1638 Pet. 15) sent letters to all plaintiffs (83-1638 Pet. App. F, G) explaining that if counsel were to file a petition for a writ of certiorari on behalf of those plaintiffs who were found not to be qualified to share in timber revenues and who therefore were denied summary judgment, such a petition might create a "risk" for (*id.* at F6) or be "harmful to" (*id.* at G4) the majority of their clients in whose favor summary judgment had been granted. Therefore, both counsel informed the recipients they would not seek further review in this Court, but advised the plaintiffs who wished to seek such review to retain new counsel (*id.* at F8, G5). The petition in No. 83-1638 was filed in response to this letter, and it challenges the exclusion of the plaintiffs whose motions for summary judgment were denied.

ARGUMENT

We continue to believe that the Court of Claims—and now the Federal Circuit—have clearly erred and done an injustice to the Hoopa Valley Tribe in holding that the Secretary of the Interior was barred from making per capita distributions of revenue from timber sales on the Square only to members of the Hoopa Valley Tribe. That Tribe traditionally has occupied the Square, while the

Yurok and other Indians whose descendants are plaintiffs here traditionally occupied the Addition to the Reservation and had an opportunity to accept (and in many cases did accept) allotments there. The Secretary therefore reasonably could conclude that only the members of the Hoopa Valley Tribe are "members of the tribe or tribes concerned" with the harvesting of timber on the Square, who alone were entitled under 25 U.S.C. 407 to have the timber revenues applied to their benefit.[8] This Court, however, has twice denied petitions for a writ of certiorari filed by the United States and the Hoopa Valley Tribe seeking review of the Court of Claims' decisions holding that the Secretary's actions were unlawful. 416 U.S. 961 (1974); 455 U.S. 1034 (1982). We therefore have eschewed asking once again that the Court review that question, especially since this case is still in an interlocutory posture.

If we accordingly accept for present purposes the underlying premise of the Court of Claims' and Federal Circuit's rulings that at least some Indians of the Addition were entitled to participate in per capita distributions of timber revenues, the decision below determining *which* additional persons were entitled to do so does not warrant review at this time. As an initial matter, there is a substantial question whether this Court even has jurisdiction over the case under 28 U.S.C. 1254(1), because it does not appear that the case was properly "in" the court of appeals at this interlocutory stage. See pages 7-8 & note 6, *supra*. But even if the Court has jurisdiction, review is unwarranted. Although we, like the Tribe, are troubled by the potential ramifications of the expansive language the court below used in its interpretation of 25 U.S.C. 407, the precedential effect of the decision may prove to be confined to the somewhat unusual circumstances of the Hoopa Valley Reservation.

---

[8] Our position on this point is fully set out in our Petition for a Writ of Certiorari and Reply Brief in *United States* v. *Jessie Short, et al.*, No. 81-1373. We will not repeat that discussion here.

And even that effect is uncertain, because the court of appeals has not yet finally determined how many plaintiffs ultimately may qualify to share in the revenues or the amount of the United States' liability to them. Similarly, the court of appeals has not finally rejected the claims of the individual plaintiffs who are petitioners in No. 83-1638, and review of their claims at this time therefore would also be premature.

1. a. We shall first address the contentions of the Tribe in No. 83-1555. We must disagree at the outset with the Tribe (Pet. 18-21) that the decision below conflicts with *United States* v. *Mitchell (Mitchell II)*, No. 81-1748 (June 27, 1983). There, this Court held that an amalgam of several statutes, including 25 U.S.C. 407, gave rise to a fiduciary responsibility on the part of the federal government to manage timber resources and sales for the benefit of the affected Indians, and that a breach of this duty could be remedied by a suit against the United States for money damages under the Tucker Act (slip op. 13, 16-17, 22). The court below concluded that, since the United States has a fiduciary responsibility under 25 U.S.C. 407 and *Mitchell II* with respect to timber management and the use of revenues derived therefrom, if the Secretary decides to distribute those revenues to individuals, he cannot arbitrarily exclude from that distribution persons who Congress intended to be beneficiaries of the trust relationship. See Pet. App. 8. We do not believe that this conclusion, as an abstract matter, is inconsistent with the Court's decision in *Mitchell II*—so long as it preserves discretion for the Secretary to devote timber revenues to certain *tribal* purposes (*e.g.* a school or roads) and, if he makes distributions to individuals, to draw reasonable distinctions among them on the basis of such legitimate factors as individual need or the strength of the recipient's ties to the Reservation. Our disagreement instead is with the conclusion by the courts below that the Secretary acted arbitrarily in excluding the particular plaintiffs involved here from past per capita dis-

tributions. *Mitchell II* does not address this distinct question of *who* must be considered a beneficiary of the trust relationship the Court in *Mitchell II* found to be established by 25 U.S.C. 407.

b. Of course, putting *Mitchell II* to one side, it does not follow that the court of appeals was correct in holding that the Secretary unlawfully excluded the individual plaintiffs in this suit from past per capita distributions and therefore violated a fiduciary responsibility to them under 25 U.S.C. 407. Section 407 authorizes the Secretary to apply proceeds from the sale of timber on unallotted reservation lands "for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he shall direct." Here, the Secretary reasonably could conclude that since the Hoopa Valley Tribe occupies the Square, only persons who are members of that Tribe are "members of the tribe * * * concerned" with the timber on the Square and that per capita distributions accordingly should be made only to them. The plaintiffs are not members of the Hoopa Valley Tribe, and indeed they have not sought to recover in this suit as members of *any* tribe. They instead have sought to recover as individual Indians of the Reservation, and they have done so even though the great majority do not even reside on the Reservation. The court of appeals nevertheless concluded that the individual plaintiffs could be regarded as "members" of a "tribe concerned" for purposes of Section 407 (Pet. App. 7). The court reached this strained result by construing the term "tribe" in Section 407 to mean "the general Indian groups communally concerned with the proceeds [of timber sales]—not an officially organized or recognized tribe" (*ibid.*).

We, like the Tribe (Pet. 6-7, 9-10), are disturbed by this expansive language used by the court of appeals in discussing 25 U.S.C. 407, because it can be read to suggest that a court has the power to decide for itself that individual unaffiliated Indians who reside on a Reservation set aside for a designated Tribe but who are not

members of that Tribe are nevertheless "communally concerned" with the Reservation's resources and are entitled to share in the revenues generated by those resources, notwithstanding the Secretary's considered judgment and consistent practice that the resources were intended and should be utilized for the benefit of the enrolled members of the Tribe. Such a construction would constitute an unprecedented judicial intrusion into matters entrusted to the political branches and to the Indian Tribes. But the opinion is capable of a narrower reading.

The court of appeals stated that its construction of the term "tribe" in Section 407 as embracing a group of individual Indians was the "implicit holding of the Court of Claims when it decided in 1981 * * * that the non-organized Yurok Tribe should not be substituted for the present plaintiffs" (Pet. App. 7); and the court reasoned that this construction in any event must be proper because the Court of Claims had already twice held that qualified individual plaintiffs were entitled to share in timber proceeds (*ibid.*). Thus, the court below candidly acknowledged that it was driven to its strained reading of 25 U.S.C. 407 by the Court of Claims' prior reading of the 1864 Act and the Executive Orders as creating a right in the plaintiffs to share in the resources of the entire Reservation, including the Square. It is for this reason—however erroneous the Court of Claims' prior decisions might have been—that the court of appeals' construction of Section 407 might be limited to the circumstances of the Hoopa Valley Reservation.

The court of appeals in effect concluded (although it did not explain its holding in precisely this way) that there were two groups of Indians "concerned" with timber operations on the Reservation within the meaning of 25 U.S.C. 407—the Hoopa Valley Tribe on the Square and the Indians affiliated with the Addition—and that the latter group had been wrongfully excluded in its entirety from participating in the benefits generated by resources on the Square. The court then concluded that although

the latter group of Indians having a nexus to the Addition was not formally organized or recognized, there were sufficient affiliations among its members—in their own nexus (or that of their ancestors) to the Reservation and to tribes or bands who formerly lived there—that they could be treated as a "tribe" for purposes of Section 407.[9] And because that group had not organized itself and defined its own membership (and indeed has steadfastly resisted doing so)—and because the Secretary likewise had not exercised his authority under 25 U.S.C. 163 to establish a membership roll for this group or "tribe" of Indians of the Addition—the Court of Claims and now the Federal Circuit evidently thought they should fill the void they perceived by defining their own standards of membership for this group. If the proceedings below are understood in this manner, the opinion of the court of appeals would not apply to other Reservations where either the Tribe or the Secretary *has* established a membership roll that in turn entitles the enrollees to participate in the distribution of timber revenues under 25 U.S.C. 407. In such a case, a court could not properly second-guess the established membership standards. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978).

We do not suggest, of course, that the court below and the Court of Claims had the authority to second-guess the Secretary's recognition of the Hoopa Valley Tribe as the only "tribe concerned" with matters on the Square, to designate another group as equally concerned, and to

---

[9] In other circumstances, such an interpretation of 25 U.S.C. 407 might be acceptable. For example, if there was a reservation set aside for and occupied entirely by Indians who had not been formally organized into a tribe, we believe that the Secretary would be authorized by Section 407 to treat those Indians as a tribe for purposes of applying timber revenues for their benefits, in order to implement the congressional intent that some group of Indians on the reservation benefit from timber harvesting. The difference here is that the court below took upon itself (albeit for limited purposes) the task traditionally assigned to the political branchs of recognizing a tribe.

adopt standards for membership in that group. Indeed, the inappropriateness of the task for judicial resolution is made manifest in this case by the difficulties and apparent arbitrariness of the line-drawing by the trial judge in identifying categories of qualifying plaintiffs, the assertions by the petitioners in No. 83-1638 of a conflict of interest on the part of lawyers representing the numerous plaintiffs seeking to qualify, and by the steadfast refusal of the plaintiffs (most of whom do not even reside on the Reservation) to organize themselves as a tribe. We merely suggest (and hope) that the judicial intrusion into matters entrusted to the political branches that has occurred in this case might prove to be confined to this case. In fact there are indications that the court of appeals intended its opinion to be limited. See Pet. App. 8 (discussing its interpretation of the term "tribe" as meaning Indians residing on one reservation: "With respect to the Hoopa Valley Reservation, that is its meaning in 25 U.S.C. § 407."); see also *id.* at 20. But if the court's construction of 25 U.S.C. 407 does generate problems on other Reservations, as the Tribe predicts (Pet. 6-11)—or if the adverse consequences seem especially adverse even on the Hoopa Valley Reservation alone—we and the Tribe retain the option of petitioning for a writ of certiorari after the Claims Court has entered a final judgment in the case and the Federal Circuit has reviewed that judgment.

c. The Tribe finally contends (Pet. 11-18) that the court of appeals' extension of 25 U.S.C. 407 to include as beneficiaries individual Indians who are not organized or recognized as a Tribe raises constitutional questions because it creates a suspect classification based on race rather than the individual's political affiliation as a member of a tribe. This problem, they argue, stems from the fact that three of the categories of qualifying plaintiffs require ¼ Indian blood and that other plaintiffs qualify on the basis of being descendants of allottees or assignees of land on the Reservation, who presumably also were

Indians. See note 4, *supra*. This objection, however, was not addressed by the courts below, and therefore should not be considered by this Court at the present time. The Tribe still has the opportunity to present this argument to the courts below in further proceedings, and review by this Court will be available upon entry of a final judgment.

In any event, although we obviously have not had an opportunity to analyze the potential application of this argument to each of the more than 3,000 individual plaintiffs, we do not at this stage perceive a subtantial constitutional problem. The plaintiffs in this case who have been found qualified have more in common than simply a particular quantum of Indian blood, and the classification therefore is not simply racial, as the Tribe suggests. All of the plaintiffs have a nexus to the Reservation or to the tribes or bands for which the Reservation was set aside. The first category of qualifying plaintiffs, for example, is comprised of allottees of Reservation land living in 1949 and their lineal descendants, and the second is comprised of residents of the Reservation living in 1949 who received Reservation benefits and services and hold an assignment of land or are eligible for an allotment, and their lineal descendants. Assuming (contrary to our submission) that these plaintiffs' nexus to the Addition rather than the Square entitles them to share in timber revenues from the Square, that nexus surely is sufficiently strong that Congress, through 25 U.S.C. 407, rationally may include them in a distribution of revenues derived from the Reservation.

The third category of plaintiffs is comprised of persons living in 1953 who have ¼ "Reservation blood" (defined to mean that they are descendants of members of the tribes for which the Reservation originally was set aside (83-1638 Pet. App. B98-B99)) and who have forebears born on the Reservation and were resident there for 15 years before 1953. These persons, too, have a direct nexus to the Reservation. Moreover, because this category effec-

tively establishes eligibility on the basis of a person's affiliation (through descent) with one of the original tribes on the Reservation, the decision below applies the statute enacted by Congress in a way that clearly is reasonably related to what the Tribe concedes (Pet. 12-14) to be Congress's power to deal with Indian *tribes*. Thus, even assuming that Congress is somehow barred from conferring on individual Indians, as such, the benefits of property that was set aside for Indians—a proposition that we strongly dispute (cf. *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977))—the arrangement here is valid.

The last two categories of eligible plaintiffs are comprised of persons of ¼ Indian blood born after 1949 to a parent or parents who were Indians of the Reservation under any of the first three categories. Since, as we have shown, the plaintiffs in the first three categories have a sufficient nexus to the Reservation that Congress rationally may include them among the beneficiaries of Reservation resources, it surely cannot be impermissible to include their children as well. The Tribe apparently complains of the requirement that these children have at least ¼ Indian blood in order to qualify. But that requirement serves to limit the number of qualified plaintiffs, and thus to work to the Tribe's benefit by limiting the diversion of timber revenues from its own members. We therefore question whether the Tribe should be heard to complain of that feature here, even assuming that the Tribe has an interest to assert in a possible equal protection problem in distinguishing among the plaintiffs.

In any event, such limitations by quantum of Indian blood are common. Indeed the one here was patterned after the Hoopa Valley Tribe's own comparable membership requirement (Pet. App. 11 n.12). In addition, the Indian Reorganization Act's definition of the term "Indian" includes "persons of one-half or more Indian blood," as well as persons of Indian descent who are members of a recognized tribe and the descendants of such members. 25 U.S.C. 479. It is too late in the day to suggest that

classifications that are so pervasive in the realm of Indian law and tradition raise a serious constitutional question—at least where, as here, the individuals involved have other connections to the Reservation or tribes who resided there and the classification is used to identify those individuals who will share in a benefit that the Tribe itself presumably would concede Congress legitimately conferred on some group of Indians, to the exclusion of non-Indians (cf. *Morton* v. *Mancari*, 417 U.S. 535 (1974); *Delaware Tribal Business Committee* v. *Weeks*, *supra*), rather than to impose a liability on the individuals (cf. *United States* v. *Antelope*, 430 U.S. 641, 646 & n.7 (1977)).

2. The submission by the petitioners in No. 83-1638 that the courts below erred in not granting summary judgment to other plaintiffs likewise does not warrant review at this time.

a. As an initial matter, the identity of the persons on whose behalf the petition has been filed is unclear. The petition purports to be filed on behalf of (a) Christopher Eddy; (b) the 1,127 individual plaintiffs whose motions for summary judgment were denied by the trial judge; (c) "[t]hose persons, not named in the petition, who would otherwise qualify to receive the funds in issue," born between the filing of this case and final judgment; and (d) the "heirs, successors and assigns" of the foregoing persons. See 83-1638 Pet. iv-v. Throughout this case, however, all of the plaintiffs have sued in their own right as named parties. This case is not a class action. Moreover, in a 1976 order the Court of Claims allowed a final group of named plaintiffs to intervene in their own right and announced that, "to the extent this is a class action," the class is closed (83-1638 Pet. App. A1-A2, B2; *Short* v. *United States*, 209 Ct. Cl. 777 (1976)). As a result, the last two categories on whose behalf the petition purports to be filed are not even parties to the case.

The 1,127 individual plaintiffs who are referred to in the petition and whose motions for summary judgment

were denied are parties to the case, but it is not clear which of them (if any), in addition to Eddy, actually desires to have his individual claim reviewed by the Court at this time or has personally authorized counsel to file a certiorari petition on his behalf. Since this is not a class action, Eddy cannot seek review as their class representative. If in fact less than all of these 1,127 plaintiffs properly can be regarded as petitioners herein, we do not know which ones should be so regarded or the facts of their individual claims to be Indians of the Reservation. Indeed, the petition does not even discuss the circumstances or claim of Christopher Eddy, the only plaintiff identified by name in the petition. In these circumstances, we do not see how the Court could give meaningful consideration to petitioners' claim that the lower courts erred in not including some or all of these 1,127 plaintiffs among those whom the courts below so far have found to be qualified at this interlocutory stage of the proceedings.

b. Even putting to one side our lack of information regarding the identity and circumstances of the individual petitioners, their petition should be denied. Assuming for present purposes that the courts below have correctly concluded that some group of individuals in addition to members of the Hoopa Valley Tribe are entitled to share in timber revenues from the Square, the courts below cannot be faulted for seeking to contain the resulting incursion upon what previously had been regarded as the legitimate revenue base of the Hoopa Valley Tribe by seeking to place reasonable limitations on the number of additional persons who would qualify.[10] The particular way in which the court of appeals sought to draw a line between those who qualify and those who do not—by patterning the standards after the membership standards of the Hoopa Valley Tribe—does not warrant review.

---

[10] We contended below that the trial judge had qualified too *many* of the plaintiffs, but the court of appeals rejected that contention. Pet. App. 15-17.

Moreover, the 1,127 plaintiffs have not been conclusively determined not to be eligible to participate. Although their motions for summary judgment in their favor were denied, a final judgment has not been entered against them. Even under the decision they attack, petitioners still will have an opportunity before the Claims Court on remand to show that they in fact fall within one of the five categories of plaintiffs the Claims Court found to be qualified or that they should be found qualified because their exclusion would be "manifest[ly] unjust[]" (83-1638 Pet. App. B99-B100; Pet. App. 9-10, 14, 21, 23). Individual plaintiffs should be required to exhaust this possible avenue of relief before seeking review in this Court. In the course of doing so, they will be able to create a record of their own backgrounds and the circumstances of their claims of entitlement that in turn can furnish a basis for review by the court of appeals and this Court.[11]

---

[11] Like the Tribe, petitioners in No. 83-1638 object (Pet. 21-31) to the qualifying standards adopted by the courts below on the ground that they establish impermissible or suspect racial classifications. But although the Tribe contends that this defect required that *none* of the plaintiffs should be found qualified, the petitioners in No. 83-1638 contend that this defect requires that *all* the plaintiffs be found qualified. These extreme and diametrically opposed positions—which would require Congress, the courts, and the Secretary to take an all-or-nothing approach—serve only to reinforce our submission above (see pages 19-21, *supra*) that the federal government, in carrying out its constitutionally based guardianship responsibility to the Indian people, has not been placed in a self-defeating constitutional straightjacket derived from legal principles on questions of race in other settings. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. at 551-555; *United States* v. *Kagama*, 118 U.S. 375, 383-384 (1886). As we have explained above, the qualification based on a quantum of Indian blood is common in Indian law and tradition, and its adoption by the court of appeals to define the "tribe" it held to be concerned with timber revenues on the Reservation within the meaning of 25 U.S.C. 407 does not warrant review. Indeed, petitioners concede (83-1638 Pet. 24, 27-28) that this is an acceptable basis on which to define tribal membership.

c. Finally, petitioners in No. 83-1638 contend (Pet. 31-39) that the Court should grant review because the lawyers who represented them in the courts below had a conflict of interest resulting from their simultaneous representation of plaintiffs who ultimately were found to be qualified. This claim was not raised or considered by the courts below, and there accordingly is no record or finding below regarding: the existence, timing, or effect of the alleged conflict; whether it was waived; and whether it should in any event affect the validity of the decision below to the extent it is favorable to the United States or the Tribe.[12] It may be that petitioners cannot be entirely faulted for the failure of this issue to surface at an earlier date.[13] But a denial of review here will not foreclose its consideration, because petitioners, now represented by new counsel, presumably remain free to raise

---

[12] Even when inadequate representation is later alleged, "[a] party with privately retained counsel does not have any right to a new trial in a civil suit because of inadequate counsel, but has as its remedy a suit against the attorney" (*Watson* v. *Moss*, 619 F.2d 775, 776 (8th Cir. 1980)), or for a remission of fees charged (cf. *Littell* v. *Morton*, 369 F. Supp. 411, 425-426 (D. Md. 1974), aff'd, 519 F.2d 1339 (4th Cir. 1975)).

[13] As the court below said in another context, this case is an adversary proceeding. Accordingly, it was incumbent on plaintiffs to control the prosecution of their own case; the government could not be required to assist them in such prosecution or conduct it on their behalf. *Short* v. *United States*, 207 Ct. Cl. 964 (1975). Plaintiffs' responsibility included the selection of their own counsel, with all consequences flowing from that choice. Nor is it incumbent on a court to reopen and retry issues because counsel's previous representation was inadequate or improper. Parties to civil litigation are presumptively bound by acts and undertakings of their counsel. Cf. *Nevada* v. *United States*, No. 81-2245 (June 30, 1983); *Oglala Sioux Tribe* v. *Homestake Mining Co.*, 722 F.2d 1407, 1413-1414 (8th Cir. 1983); *Pueblo of Santo Domingo* v. *United States*, 647 F.2d 1087, 1088-1089 (1981), cert. denied, 456 U.S. 1006 (1982); *Navajo Tribe* v. *United States*, 601 F.2d 536, 540 (1979), cert. denied, 444 U.S. 1072 (1980). Moreover, it seems likely that the plaintiffs have been aware, at least in general terms, of the varying strength of their individual claims.

the conflict-of-interest issue in the course of further proceedings in the courts below.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
F. HENRY HABICHT, II
Assistant Attorney General
JAMES E. BROOKSHIRE
DAVID C. SHILTON
DIRK D. SNEL
Attorneys

MAY 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421925 999